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90-504

No. _____

Supreme Court, U.S.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

FLEET FACTORS CORP.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

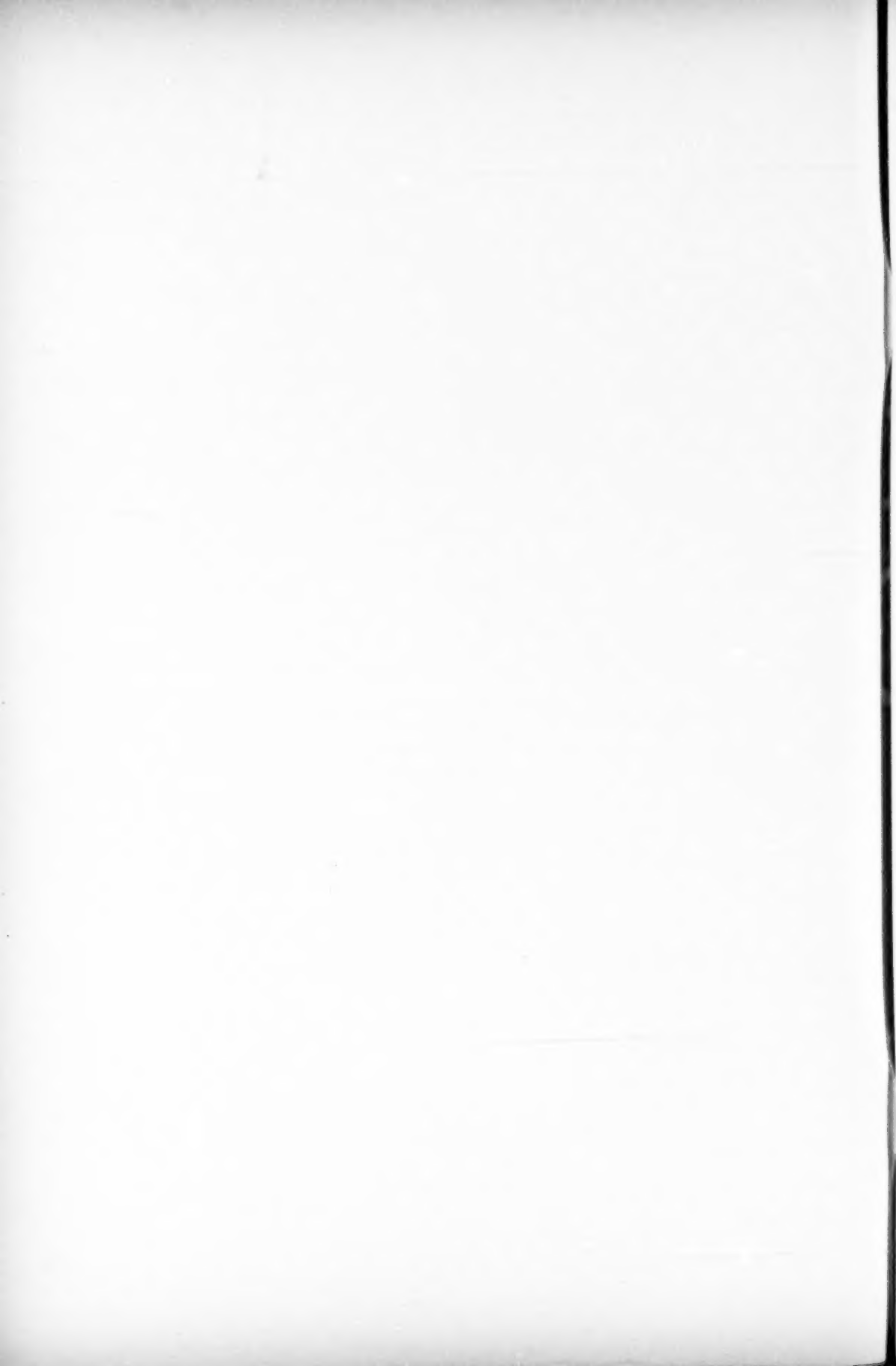
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QUESTION PRESENTED

CERCLA, the federal Superfund statute, imposes strict liability for environmental response costs on the owner or operator of a facility. Congress included an express exemption for a secured lender who holds "indicia of ownership" to protect its security interest but does not participate in the management of the borrower's facility.

Is a secured lender liable under CERCLA for environmental response costs incurred at the borrower's facility, despite the statutory exemption for secured lenders, where the lender neither took legal title to any of the borrower's property, nor participated in the day-to-day management of the facility?

PARTIES IN THE ELEVENTH CIRCUIT

The caption of this Petition contains the names of all the parties to this action in the Eleventh Circuit. Fleet Factors Corp. is a wholly-owned subsidiary of Fleet/Norstar Financial Group, Inc. Neither Fleet Factors Corp. nor its parent have any corporate affiliates other than wholly-owned subsidiaries.

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No.

FLEET FACTORS CORP.,
v. *Petitioner,*

UNITED STATES OF AMERICA,
Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

Fleet Factors Corp. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, entered on May 23, 1990.

OPINIONS BELOW

The Eleventh Circuit opinion is reported at 901 F.2d 1550 (11th Cir. 1990), and is attached as Appendix A to this Petition. The opinion of the United States District Court for the Southern District of Georgia is reported at 724 F. Supp. 955 (S.D.Ga. 1988), and is attached as Appendix B to this Petition.

JURISDICTION

The judgment of the Eleventh Circuit was entered on May 23, 1990. The Eleventh Circuit's Order, affirming in part and reversing in part the district court's decision, is attached as Appendix C. A timely petition for rehearing and suggestion for rehearing *in banc* was filed on June 12, 1990, and was denied by the Eleventh Circuit in

an Order dated July 17, 1990, attached as Appendix D. This Court has jurisdiction under 28 U.S.C.A. § 1254(1) (West Supp. 1990).

STATUTE INVOLVED

Section 107(a) of CERCLA, 42 U.S.C.A. § 9607(a) (West Supp. 1990) provides:

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—

(1) the owner and operator of a vessel . . . or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

[subparagraphs (3) and (4) omitted]

shall be liable for—

(A) all costs of removal or remedial action incurred by the United States government or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

[subparagraphs (C) and (D) omitted]

The definition of owner or operator states that “[s]uch term does not include a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility.” CERCLA § 101(20) (A), 42 U.S.C.A. § 9601(20) (A) (West Supp. 1990) (the “secured lender exemption”).

STATEMENT OF THE CASE

Petitioner Fleet Factors Corp. ("Fleet") entered into an agreement in 1976 with Swainsboro Print Works ("SPW"), a textile finishing company, pursuant to which Fleet advanced funds to SPW, and obtained as collateral a security interest in SPW's accounts receivable, inventory, fixtures, and equipment. Fleet also obtained a deed to secure debt on SPW's facility and real property in Emanuel County, Georgia.

In 1979, SPW filed a petition under Chapter XI of the Bankruptcy Act. Fleet continued to make secured loans to SPW pursuant to bankruptcy court approval. In early 1981, SPW ceased operations. Later that year SPW was adjudicated a bankrupt and the bankruptcy court appointed a trustee to supervise liquidation of SPW's assets.

In May 1982, Fleet obtained bankruptcy court approval to foreclose on its security interests covering SPW's inventory and equipment. Fleet engaged a firm of auctioneers, which conducted a public auction in June 1982. Fleet itself did not bid at this auction. The inventory and equipment was sold "as is" and "in place." Fleet never foreclosed on its deed to secure debt on SPW's real property and never took legal title to SPW's facility.

Eighteen months after the auction sale, the Environmental Protection Agency ("EPA") entered the SPW facility, and removed a number of drums and asbestos-containing materials from the plant and disposed of them. In 1987, Respondent the United States, filed suit against Fleet, alleging that Fleet was liable under § 107(a) of CERCLA, 42 U.S.C.A. § 9607(a) (West Supp. 1990), for response costs incurred by the EPA in removing the materials from the facility. The United States claimed Fleet was liable as either a present owner and operator of the facility, or the owner or operator of the facility

at the time the wastes were disposed. Fleet denied all liability on the ground, among others, that it was within the secured lender exemption. The United States and Fleet filed cross-motions for summary judgment.

The district court denied both motions for summary judgment, but *sua sponte* certified its decision for interlocutory appeal to the Eleventh Circuit (under 28 U.S.C.A. § 1292(b) (West Supp. 1990)). Fleet petitioned for leave to appeal the district court's denial of its summary judgment motion, which the Eleventh Circuit granted. The appeal was argued on October 30, 1989 before a panel consisting of Circuit Judges Vance and Kravitch and Senior District Judge Lynne, of the U.S. District Court for the Northern District of Alabama, sitting by designation. Judge Vance was assassinated in December 1989, and this case was decided by Circuit Judge Kravitch and District Judge Lynne.

The panel affirmed in part and reversed in part the district court decision, and examined three different periods in the relationship of Fleet and SPW:

1976 to February 1981: This is the period from Fleet's first loans to SPW to the time SPW ceased operations. The Eleventh Circuit held, in agreement with the district court, that Fleet had no liability for its actions during this time.

February 1981 to June 1982: This is the period after SPW ceased operations but before Fleet foreclosed its security interests in SPW's inventory and equipment. The Eleventh Circuit, reversing the district court, held that the allegations by the United States would be sufficient, if proven, to hold Fleet liable. It is this holding that is the focus of this petition for certiorari.

June 1982 to December 1983: This is the period between Fleet's foreclosure on SPW's inventory and equipment and the time a private contractor left the facility. The Eleventh Circuit agreed with the dis-

trict court that there were genuine issues of fact for trial with respect to this period.

The focus of this petition is the point on which the Eleventh Circuit reversed the district court—that is, whether Fleet could be held liable on any correct reading of the secured lender exemption for its actions after SPW ceased operations but before Fleet foreclosed its security interests in SPW's inventory and equipment. This issue warrants review by this Court.

REASONS FOR GRANTING THE WRIT

I. THE ELEVENTH CIRCUIT'S DECISION DISRUPTS NORMAL AND PRUDENT COMMERCIAL PRACTICES

The issue of the scope of secured lender liability under CERCLA is of extraordinary importance to commercial law. The Eleventh Circuit's broadening of potential CERCLA liability for secured lenders is disrupting commercial practices, and causing great concern in both the lending and business community.

The Circuit Court's holding makes it extremely difficult for financial institutions to determine how they can protect their secured loans without incurring massive liability. Financial institutions, small businesses, and the United States economy are at risk of suffering from the detrimental effects of increased lender wariness due to this uncertainty.

It is important for this Court to clarify the reach of the CERCLA liability scheme as it relates to lenders so as to bring certainty back into commercial practices. The decision below explicitly rejects the line of cases regarding the CERCLA secured lender exemption on which financial institutions have been relying. (*United States v. Mirabile*, 15 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,994 (E.D. Pa. Sept. 4, 1985); *United States v. Maryland*

Bank & Trust Co., 632 F. Supp. 573, 578 (D. Md. 1986); *Guidice v. BFG Electroplating & Mfg. Co.*, 732 F. Supp. 556, 561 (W.D. Pa. 1989)). Financial institutions therefore look with confusion to the leading appellate court decision addressing the secured lender exemption.

The only other circuit court case addressing the exemption is in tension with *Fleet Factors*. *In re Bergsoe Metal Corp.*, No. 89-35397 (9th Cir. Aug. 9, 1990) (LEXIS, Genfed library, Courts file). In that case, the Ninth Circuit refuses to go as far as the Eleventh Circuit in finding secured lenders responsible for the cost of hazardous waste removal. The Ninth Circuit in *Bergsoe Metal* emphasizes the necessity for actual management of the facility before incurring liability, stating that "whatever the precise parameter of 'participation,' there must be some actual management of the facility before a secured lender will fall outside the exception. . . . Merely having the power to get involved in management, but failing to exercise it, is not enough." *Id.* at 10. The Ninth Circuit's emphasis on actual involvement contrasts with the *Fleet Factors* rule that the inference that the lender had the ability to influence decisions regarding hazardous waste is enough to hold the lender liable. The conflicting messages of these two Circuit Court decisions exacerbate the confusion of the business and lending community.

The decision below is making the already wary banking industry even more reluctant to lend to many borrowers, not just those who present obvious environmental liability problems, and less willing to help troubled borrowers through difficult financial times. Inhibited financial transactions and modified lending practices will reduce the supply and increase the cost of capital for many borrowers. Old industrial property is likely to remain abandoned and unused for fear of environmental liability. Increased caution on lenders' part will probably result in more bankruptcies, since helping a borrower over-

come financial difficulties will seldom be worth the risk of cleanup liability, considering the unpredictable scope of CERCLA damages. In fact, if courts attempt to follow the holding of the Eleventh Circuit, lenders will be liable in countless unpredictable situations.

Although in some cases it would be appropriate to let an issue percolate further in the lower courts before this Court's consideration, the decision below is causing such disruption to commercial practices and potential harm to the nation's economy that it warrants this Court's review at the present time.

II. THE ELEVENTH CIRCUIT'S DECISION CREATES A NEW CLASS OF LIABILITY THAT WAS NEVER INTENDED BY CONGRESS

The panel announced a new standard for secured lender liability under CERCLA:

Under the standard we adopt today, a secured creditor may incur section 9607(a)(2) liability, without being an operator, by participating in the financial management of a facility to a degree indicating a capacity to influence the corporation's treatment of hazardous wastes. It is not necessary for the secured creditor actually to involve itself in the day-to-day operations of the facility in order to be liable—although such conduct will certainly lead to the loss of the protection of the statutory exemption. Nor is it necessary for the secured creditor to participate in management decisions relating to hazardous waste.

App. A at 13a-14a (notes omitted, emphasis added). This novel holding creates a new category of CERCLA liability and warrants review by this Court.

The result of the decision below is to create a new class of liable parties under § 107(a)(2): a secured lender can become liable without any participation in the day-to-day operations of the facility, merely because the lender holds indicia of ownership to protect its security

interest. This is the result opposite that intended by the words of the statute and previous case law.

The Eleventh Circuit's interpretation of CERCLA turns the statute on its head by using the exemption to subject lenders to liability rather than to shield lenders from liability. Ironically, the court below bases Fleet's liability on the very language—"participating in management"—that is intended to protect secured lenders from such liability. Congress did not intend for the secured lender exemption to operate as an independent means of imposing liability on secured lenders.

The Eleventh Circuit acknowledges that its holding imposes new liabilities on secured lenders: "[C]reditors' awareness that they are potentially liable under CERCLA will encourage them to . . . insist upon compliance with acceptable treatment standards" App. A at 15a. Rather than protect secured lenders, as Congress intended, the decision below places lenders in an impossible position. If a lender "insist[s] upon compliance with acceptable treatment standards," then it may be liable because it has participated in management. On the other hand, if it does *not* insist on acceptable standards, the lender may nonetheless be liable if the court determines that it *could* have affected hazardous waste disposal decisions.

The increased involvement encouraged by the Eleventh Circuit is exactly the type of conduct that, according to its holding, would cause a secured lender to "anticipate losing its exception from CERCLA liability." The Eleventh Circuit welcomes this result on the ground that it gives lender a "strong incentive to address hazardous waste problems", but under this vague standard secured lenders, as a practical matter, always will be liable for CERCLA clean-up costs. In other words, it renders meaningless the secured lender exemption. The Eleventh Circuit's "inference" test requires only that a secured lender:

participat[e] in the *financial management* of a facility to a degree indicating a *capacity to influence* the corporation's treatment of hazardous wastes. . . .

[A] secured creditor will be liable if its involvement with the management of the facility is sufficiently broad to support the inference that it *could* affect hazardous waste disposal decisions *if it so chose*.

App. A at 14a (emphasis added).

The inference test, by its terms, applies only in situations in which a lender has *not* been involved in the borrower's hazardous waste decisions. In such situations the lender's liability turns on purely hypothetical facts and inferences that the lender *could* have influenced the borrower's disposal of hazardous substances. Inferences about hypothetical facts serve as inadequate raw materials for constructing principled judicial decisions and for rational decision-making by lenders. Moreover, the inference test fashioned by the Eleventh Circuit will in virtually all instances be satisfied, if not by the rights and powers afforded to lenders under typical commercial loan agreements, then surely by the conduct of lenders that the Eleventh Circuit's opinion expressly encourages.

A lender possesses the ability to set the terms, financial and otherwise, under which it will make a loan or offer financial accommodations to a borrower. A lender may condition the loan or financial accommodation on the borrower's compliance with applicable laws in general and environmental laws in particular. Commercial loan agreements commonly and prudently include covenants requiring borrowers to comply strictly with all laws and regulations that relate to or impact upon the borrower or its business and assets, including environmental laws. They also include financial covenants and standards that provide significant financial and operational restraints upon the borrower and its operations. Such provisions are required, and in the marketplace are freely granted by contract, to enable secured lenders to protect their loan positions and the security interests and liens held by

them in their borrowers' assets. Yet this same control creates a "capacity to influence" the borrower and its decisions so as to subject the secured lender to CERCLA liability under the inference test adopted by the Eleventh Circuit.

III. THE ELEVENTH CIRCUIT'S DECISION IS INCONSISTENT WITH ESTABLISHED LEGAL PRINCIPLES OF LENDER LIABILITY

The Eleventh Circuit's decision is inconsistent with established legal principles of lender liability, which permit lenders to exercise significant financial control over borrowers without exposing lenders to third-party liability and other similar adverse results as long as the lenders do not exercise power or control over borrowers' day-to-day management decisions. To the extent that the panel's decision is inconsistent with established legal principles, the opinion leaves secured lenders without guidance as to the scope of proper conduct and exposes secured lenders to substantial third-party liability and related risks should they follow the lower court's encouragement.

A. Lenders Are Entitled To Exercise Financial Control Over Borrowers' Affairs

Courts have expressly recognized the appropriateness of lenders' influencing and even controlling the financial affairs of borrowers without incurring third-party liability or other similar penalties as a result of such control. By so doing, courts have acknowledged that financial control by a lender is an accepted practice in lending transactions and have established standards for appropriate lender behavior and actions. For example, a lender's control of a borrower's financial affairs by reducing the amount of indebtedness advanced to the borrower and eventually selling inventory has been held not to constitute "control" of the type justifying equitable subordination of the lender's claims. *In re Clark Pipe & Supply*

Co., Inc., 893 F.2d 693, 701 (5th Cir. 1990) (quoting in part *In re Teltronics Services, Inc.*, 29 Bankr. 139, 172 (Bankr. E.D.N.Y. 1983) (emphasis added)).

The propriety and prevalence of lenders' carefully controlling the financial affairs of borrowers was also recognized and approved in *John G. Lambros Co., Inc. v. Aetna Casualty & Surety Co.*, 468 F. Supp. 624, 628 (S.D.N.Y. 1979) (holding that intimate involvement in a borrower's financial affairs does not expose a lender to contract liability on the obligations of the borrower) (quoting in part *Stowers v. Mahon*, 526 F.2d 1238, 1256 (5th Cir. 1976), *cert. denied*, 429 U.S. 834 (1976)).

To impose CERCLA liability for the type of financial control which is accepted practice in the lending industry is a departure from established law and is inconsistent with Congress' intent in establishing the secured lender exception to CERCLA liability.

B. An Adequate Body of Law Exists for Determining the Point at Which a Lender's Participation in Management Should Subject it to Liability

Although courts have allowed lenders to become intimately involved in the financial affairs of borrowers, they have consistently and appropriately subjected lenders to liability when they become excessively involved in the management of a borrower's business operations. See *Fury Imports, Inc. v. Shakespeare Co.*, 554 F.2d 1376 (5th Cir. 1977), *cert. denied*, 450 U.S. 921 (1981) (articulating the elements of a prima facie case for tortious interference under New York law); *Krivo Indus. Supply Co. v. National Distillers & Chem. Corp.*, 483 F.2d 1098 (5th Cir. 1973) (describing lender liability under an "instrumentality" theory); *A. Gay Jenson Farms Co. v. Cargil, Inc.*, 309 N.W.2d 285 (Minn. 1981) (holding borrower constituted an agent of the lender). Each of these decisions, like the larger body of case authority of which it is a part, evidences a strong and con-

sistent policy of discouraging lenders from becoming intimately involved in the day-to-day business decisions and operations of borrowers.

In *In re Clark Pipe & Supply Co., Inc.*, the court held that because a lender had not exercised excessive control over the borrower's business, its claims would not be subordinated in bankruptcy. *In re Clark Pipe & Supply Co., Inc.*, 893 F.2d at 702. However, in reaching that decision the court recognized the potential for subordination stating:

The purpose of equitable subordination is to distinguish between the unilateral remedies that a creditor may properly enforce pursuant to its agreements with the borrower and other inequitable conduct such as . . . the exercise of such total control over the borrower as to have essentially replaced its decision-making capacity with that of the lender. The crucial distinction . . . [is] between the existence of 'control' and the exercise of that 'control' to direct the activities of the borrower.

Id. at 701. *Cf. A. Gay Jenson Farms Co. v. Cargil*, 309 N.W.2d 285 (Minn. 1981) (lender which controls a borrower's business operations liable as principal for the acts of its borrower).

Thus, an adequate body of law exists for determining where a lender steps over the line of proper involvement in a borrower's affairs to incur liability. Surely it is this type of management control which Congress had in mind when it provided that "participat[ion] in management" is sufficient to remove a lender from the secured lender exemption. Applying this existing body of law to CERCLA, even if Fleet *were* an "owner," by virtue of its security deed, it nevertheless did not exercise the "participation in management" necessary to be held liable under the statute.

C. The Eleventh Circuit's Approach Exposes Lenders to Substantial Risk Under Other Doctrines of Lender Liability

The Eleventh Circuit demands that lenders control the environmental waste operations of borrowers at a level that courts have previously held sufficient to create liability. The Eleventh Circuit stated:

[o]ur ruling today should encourage potential creditors to investigate thoroughly the waste treatment systems and policies of potential borrowers.

* * * *

. . . [This potential liability] will encourage them to monitor the hazardous waste treatment systems and policies of their borrowers and insist upon compliance with acceptable treatment standards Once a secured creditor's involvement with a facility becomes sufficiently broad that it can anticipate losing its exemption from CERCLA liability, it will have a strong incentive to address hazardous waste problems at the facility rather than studiously avoiding the investigation and amelioration of the hazard.

App. A at 15a-16a. However, the court does not address the various doctrines of lender liability under federal and state law which hold liable or otherwise penalize lenders that exercise excessive influence over the management decisions and operations of borrowers. If a lender fulfills the duties imposed by the Eleventh Circuit by becoming extensively involved in the borrower's management of environmental affairs, the lender will expose itself to a host of theories of lender liability.

Thus, lenders are placed in a very precarious situation, in which liability of some type and to some party is inevitable. If the lender fails to control a borrower's compliance with environmental laws it will incur CERCLA liability, while successful control of a borrower's behavior will lead to lender liability for other obligations

the borrower incurs. The cumulative effect of the Eleventh Circuit's decision is to leave commercial lenders in this country in abysmal uncertainty as to their responsibilities in environmental matters and as to the resolution of other conflicts inherent in their position as lenders. This Court should grant the writ of certiorari to resolve that uncertainty.

CONCLUSION

For the reasons stated in this Petition, Fleet Factors Corp. requests this Court to grant the writ of certiorari to review the judgment of the Eleventh Circuit.

Respectfully submitted,

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APPENDICES

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 89-8094

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.

FLEET FACTORS CORP.,
Defendant-Third Party
Plaintiff-Appellant,

CLIFFORD HOROWITZ and MURRAY NEWTON,
Defendants,

ROBERT KOLODNEY, ESQ., AS TRUSTEE OF
SWAINSBORO PRINT WORKS, INC.,
Debtor,
Third Party-Defendant.

Appeal from the United States District Court
for the Southern District of Georgia

May 23, 1990

Before VANCE* and KRAVITCH, Circuit Judges, and
LYNNE**, Senior District Judge.

* Judge Robert S. Vance was a member of the panel which heard oral argument but due to his death on December 16, 1989 did not participate in this decision. This case is decided by a quorum. See 28 U.S.C. § 46(d).

** Honorable Seybourn H. Lynne, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

KRAVITCH, Circuit Judge:

Fleet Factors Corporation ("Fleet") brought an interlocutory appeal¹ from the district court's denial of its motion for summary judgment in this suit by the United States to recover the cost of removing hazardous waste from a bankrupt textile facility. The district court denied summary judgment because it concluded that Fleet's activities at the facility might rise to the level of participation in management sufficient to impose liability under the Comprehensive Environmental Response Compensation and Liability Act (CERCLA), 42 U.S.C. §§ 9601-57 (1982 & West Supp. 1988), despite the statutory exemption from liability for holders of a security interest. We agree with the district court that material questions of fact remain as to the extent of Fleet's participation in the management of the facility; therefore, we affirm the denial of Fleet's summary judgment motion.

FACTS

In 1976, Swainsboro Print Works ("SPW"), a cloth printing facility, entered into a "factoring" agreement with Fleet in which Fleet agreed to advance funds against the assignment of SPW's accounts receivable. As collateral for these advances, Fleet also obtained a security interest in SPW's textile facility and all of its equipment, inventory, and fixtures. In August, 1979, SPW filed for bankruptcy under Chapter 11. The factoring agreement between SPW and Fleet continued with court approval. In early 1981 Fleet ceased advancing funds to SPW because SPW's debt to Fleet exceeded Fleet's estimate of the value of SPW's accounts receivable. On February 27, 1981, SPW ceased operations and began to liquidate its inventory. Fleet continued to collect on the accounts receivable assigned to it under the

¹ This court has jurisdiction of this appeal pursuant to 28 U.S.C. § 1292(b).

Chapter 11 factoring agreement. In December, 1981, SPW was adjudicated a bankrupt under Chapter 7 and a trustee assumed title and control of the facility.

In May, 1982, Fleet foreclosed on its security interest in some of SPW's inventory and equipment, and contracted with Baldwin Industrial Liquidators ("Baldwin") to conduct an auction of the collateral. Baldwin sold the material "as is" and "in place" on June 22, 1982; the removal of the items was the responsibility of the purchasers. On August 31, 1982, Fleet allegedly contracted with Nix Riggers ("Nix") to remove the unsold equipment in consideration for leaving the premises "broom clean." Nix testified in deposition that he understood that he had been given a "free hand" by Fleet or Baldwin to do whatever was necessary at the facility to remove the machinery and equipment. Nix left the facility by the end of December, 1983.

On January 20, 1984, the EPA inspected the facility and found 700 fifty-five gallon drums containing toxic chemicals and forty-four truckloads of material containing asbestos. The EPA incurred costs of nearly \$400,000 in responding to the environmental threat at SPW. On July 7, 1987, the facility was conveyed to Emanuel County, Georgia, at a foreclosure sale resulting from SPW's failure to pay state and county taxes.

The government sued Horowitz and Newton, the two principal officers and stockholders of SPW, and Fleet to recover the cost of cleaning up the hazardous waste. The district court granted the government's summary judgment motion with respect to the liability of Horowitz and Newton for the cost of removing the hazardous waste in the drums. The government's motion with respect to Fleet's liability, and the liability of Horowitz and Newton for the asbestos removal costs was denied. Fleet's motion for summary judgment was also denied. The

district court, *sua sponte*, certified the summary judgment issues for interlocutory appeal and stayed the remaining proceedings in the case. Fleet subsequently brought this appeal challenging the court's denial of its motion for summary judgment.

STANDARD OF REVIEW

The District court's disposition of the summary judgment motion is reviewable *de novo* because it involves legal questions of statutory interpretation. See *Florida Power & Light Co. v. Allis Chalmers Corp.*, 893 F.2d 1313, 1315-16 (11th Cir. 1990); *Hiram Walker & Sons v. Kirk Line, Inc.*, 877 F.2d 1508, 1513 (11th Cir. 1989); *Clemens v. Dougherty County, Ga.*, 684 F.2d 1365, 1368 (11th Cir. 1982). Under Fed.R.Civ.P. 56(c), summary judgment is only appropriate when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." *Allis Chalmers*, 893 F.2d at 1318. In evaluating a summary judgment motion, the burden of establishing the absence of a material dispute of fact is on the moving party; the court must view all evidence in the light most favorable to the non-movant and resolve all reasonable doubts about the facts in favor of the non-movant. *Id.*; *WBS-TV v. Lee*, 842 F.2d 1266, 1269 (11th Cir. 1988); *Warrior Tombigbee Transportation Co. v. M/V Nan Fung*, 695 F.2d 1294, 1296 (11th Cir. 1983); see *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986).

DISCUSSION

The Comprehensive Environmental Response Compensation and Liability Act was enacted by Congress in response to the environmental and public health hazards caused by the improper disposal of hazardous wastes. *United States v. Maryland Bank & Trust Co.*, 632 F.Supp. 573, 576 (D.Md. 1986); S.Rep. No. 848, 96th

Cong., 2d Sess. 2 (1980), U.S. Code Cong. & Admin. News 1980, p. 6119. The essential policy underlying CERCLA is to place the ultimate responsibility for cleaning up hazardous waste on "those responsible for problems caused by the disposal of chemical poison." *Allis Chalmers*, 893 F.2d at 1316; *United States v. Aceto Agricultural Chemicals Corp.*, 872 F.2d 1373, 1377 (8th Cir. 1989); *Delham Water Co. v. Cumberland Farms Dairy*, 805 F.2d 1074, 1081 (1st Cir. 1986). Accordingly, CERCLA authorizes the federal government to clean up hazardous waste dump sites and recover the costs of the effort from certain categories of responsible parties. *Maryland Bank & Trust Co.*, 632 F.Supp. at 576.

The parties liable for costs incurred by the government in responding to an environmental hazard are: 1) the present owners and operators of a facility where hazardous wastes were released or are in danger of being released; 2) the owners or operators of a facility at the time the hazardous wastes were disposed; 3) the person or entity that arranged for the treatment or disposal of substances at the facility; and 4) the person or entity that transported the substances to the facility. *Allis Chalmers*, 893 F.2d at 1317; 42 U.S.C. § 9607(a) (1982 & West Supp. 1988). The government contends that Fleet is liable for the response costs associated with the waste at the SPW facility as either a present owner and operator of the facility, *see* 42 U.S.C. § 9607(a) (1), or the owner or operator of the facility at the time the wastes were disposed, *see* 42 U.S.C. § 9607(a) (2).

The district court, as a matter of law, rejected the government's claim that Fleet was a present owner of the facility. The court, however, found a sufficient issue of fact as to whether Fleet was an owner or operator of the SPW facility at the time the wastes were disposed to warrant the denial of Fleet's motion for summary judgment.

ment. On appeal each party contests that portion of the district court's order adverse to their respective interests.

A. Fleet's Liability Under Section 9607(a)(1)²

CERCLA holds the owner or operator of a facility containing hazardous waste strictly liable to the United States for expenses incurred in responding to the environmental and health hazards posed by the waste in that facility. See 42 U.S.C. § 9607(a)(1); S.Rep. No. 848, 96th Cong., 2d Sess. 34 (1980). This provision of the statute targets those individuals presently "owning

² As an initial matter, we must consider whether this issue is properly before us on appeal. Fleet notes that the district court held that it was not liable as the present "owner or operator" of the facility and argues that its appeal did not challenge this aspect of the court's order. Rather, it only sought to appeal that part of the district court's order denying its motion for summary judgment. Fleet argues that a party is precluded from seeking reversal of an order, on an interlocutory appeal, if it did not properly petition for permission to appeal.

Fleet's position is meritless. When a district court certifies an order for appeal, all questions material to that particular order are properly before the court of appeals. See *United States v. Stanley*, 483 U.S. 669, 676-77, 107 S.Ct. 3054, 3060, 97 L.Ed.2d 550 (1987) (construing § 1292(b) interlocutory appeals to bring entire lower court order before appellate court, not just precise question certified).

Here, the district court's order clearly certifies this issue for interlocutory appeal. Even if construed otherwise, the district court expressly refused to limit its certification order to a specific issue. The district court's order states:

I find that this order disposes of controlling questions of law concerning which there is substantial doubt, *including, but not limited to*, my construction of CERCLA's definition of "owner and operator" and the secured lender exemption contained in that definition; my construction of the CERCLA provisions describing the classes of liable persons; and my construction of the scope of the third party defense to CERCLA liability.

United States v. Fleet Factors Corp., 724 F.Supp. 955, 962 (S.D.Ga. 1988) (emphasis added).

or operating such facilit[ies].” See 42 U.S.C. § 9601 (20) (A) (ii). In order to effectuate the goals of the statute, we will construe the present owner and operator of a facility as that individual or entity owning or operating the facility at the time the plaintiff initiated the lawsuit by filing a complaint.³

On July 9, 1987, the date this litigation commenced, the owner of the SPW facility was Emanuel County, Georgia. Under CERCLA, however, a state or local government that has involuntarily acquired title to a facility is generally not held liable as the owner or operator of the facility.⁴ Rather, the statute provides that

³ Although the “owner and operator” language of § 9607(a)(1) is in the conjunctive, we construe this language in the disjunctive in accordance with the legislative history of CERCLA and the persuasive interpretations of other federal courts. See *Maryland Bank & Trust Co.*, 632 F.Supp. at 577-78; see also *Guidice v. BFC Electroplating and Manufacturing Co.*, 732 F.Supp. 556, 561 (W.D.Pa. Sept. 1, 1989) (interpreting statute in disjunctive); *Artesian Water Co. v. Government of New Castle County*, 659 F.Supp. 1269, 1280 (D.Del. 1987) (same), *affirmed*, 851 F.2d 643 (3d Cir. 1988). Additionally, we note that § 9607(a)(2) is phrased in the disjunctive. We can perceive no rational explanation, other than careless statutory drafting, for imposing liability upon “owners or operators” under one section but only holding “owners and operators” liable under another section. Cf. *Coastal Casting Service v. Aron*, No. H-86-4463 (S.D.Tex. April 8, 1988) (“It is well known that CERCLA was hastily drafted and adopted, with resulting ambiguities . . .”) (available on WESTLAW as 1988 WL 35012); *Maryland Bank & Trust Co.*, 632 F.Supp. at 578 (“The structure of section 107(a) [9607(a)], like so much of this hastily patched together compromise Act, is not a model of statutory clarity.”). Our construction of both statutory provisions in the disjunctive is further supported by the fact that the definitional section of the statute only refers to the phrase “owner or operator.” See 42 U.S.C. § 9601(20) (A).

⁴ CERCLA does provide that a state or local government will be liable under these circumstances when it “has caused or contributed to the release or threatened release of a hazardous substance from the facility . . .” 42 U.S.C. § 9601(20) (D). This exception, however, is not applicable here.

in the case of any facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to a unit of State or local government, [its owner or operator is] any person who owned, operated or otherwise controlled activities at such facility immediately beforehand.

42 U.S.C. § 9601(20) (A) (iii).

Essentially, the parties disagree as to the interpretation of the phrase "immediately beforehand." The district court reasoned that Fleet could not be liable under section 9607(a)(1) because it had never foreclosed on its security interest in the facility and its agents had not been on the premises since December 1983. The government contends that the statute should be interpreted to refer liability "back to the last time that someone controlled the facility, however long ago." Appellee's Brief at 23. Thus, according to the government, the period of effective abandonment of the site by the trustee in bankruptcy (from December 1983 to the July 1987 foreclosure sale) should be ignored and liability would remain with Fleet since it was the last entity to "control" the facility.

We agree with Fleet that the plain meaning of the phrase "immediately beforehand" means without intervening ownership, operation, and control. Fleet, therefore, cannot be held liable under section 9607(a)(1) because it neither owned, operated, or controlled SPW immediately prior to Emanuel County's acquisition of the facility. It is undisputed that from December 1981, when SPW was adjudicated a bankrupt, until the July 1987 foreclosure sale, the bankrupt estate and trustee were the owners of the facility. Similarly, the evidence is clear that neither Fleet nor any of its putative agents had anything to do with the facility after December 1983. Although Fleet may have operated or controlled SPW prior to December 1983, its involvement with SPW terminated

more than three years before the county assumed ownership of the facility. The fact that the bankrupt estate or trustee may not have effectively exercised their control of the facility between December 1983 and July 1987 is of no moment. It is undisputed that Fleet was not in control of the facility during this period. Although a trustee can obviously abdicate its control over a bankrupt estate, it cannot in such a manner unilaterally delegate its responsibility to a previous controlling entity. To reach back to Fleet's involvement with the facility prior to December 1983 in order to impose liability would torture the plain statutory meaning of "immediately beforehand."⁵

B. Fleet's Liability Under Section 9607(a)(2)

CERCLA also imposes liability on "any person who at the time of disposal of any hazardous substance owned or operated any . . . facility at which such hazardous substances were disposed of. . . ." 42 U.S.C. § 9607(a)(2). CERCLA excludes from the definition of "owner or operator" any "person, who, without participating in the management of a . . . facility, holds indicia of ownership primarily to protect his security interest in the . . . facility." 42 U.S.C. § 9601(20)(A). Fleet has the burden of establishing its entitlement to this exemption. *Maryland Bank & Trust*, 632 F.Supp. at 578; see *United States v. First City National Bank of Houston*, 386 U.S. 361, 366, 87 S.Ct. 1088, 1092, 18 L.Ed.2d 151 (1967). There is no dispute that Fleet held an "indicia of ownership" in the facility through its deed of trust to SPW,

⁵ This interpretation of § 9607(a)(1) is particularly appropriate in the context of the entire statutory scheme. While § 9607(a)(1) targets present owners and operators of toxic waste facilities, § 9607(a)(2) focuses on the entities that owned or operated the facility at the time the wastes were disposed. A narrow reading of this section would not, therefore, create an unintended loophole for individuals or entities to escape liability for improperly disposing hazardous waste.

and that this interest was held primarily to protect its security interest in the facility. The critical issue is whether Fleet participated in management sufficiently to incur liability under the statute.⁶

The construction of the secured creditor exemption is an issue of first impression in the federal appellate courts. The government urges us to adopt a narrow and strictly literal interpretation of the exemption that excludes from its protection any secured creditor that participates in any manner in the management of a facility. We decline the government's suggestion because it would largely eviscerate the exemption Congress intended to afford to secured creditors. Secured lenders frequently have some involvement in the financial affairs of their debtors in order to insure that their interests are being adequately protected. To adopt the government's interpretation of the secured creditor exemption could expose all such lenders to CERCLA liability for engaging in their normal course of business.

Fleet, in turn, suggests that we adopt the distinction delineated by some district courts between permissible participation in the financial management of the facility and impermissible participation in the day-to-day or oper-

⁶ The government correctly formulates this issue as being comprised of two distinct, but related, means of finding Fleet liable under § 9607(a)(2). First, Fleet is liable under the statute if it operated the facility within the meaning of the statute. Alternatively, Fleet can be held liable if it had an indicia of ownership in SPW and managed the facility to the extent necessary to remove it from the secured creditor liability exception. See *United States v. Kayser-Roth Corp.*, 724 F.Supp. 15, 20-21 (D.R.I. 1989). Although we can conceive of some instances where the facts showing participation in management are different from those indicating operation, this is not such a case. The sum of the facts alleged by the government is sufficient to hold Fleet liable under either analysis. In order to avoid repetition, and because this case fits more snugly under a secured creditor analysis, we will forgo an analysis of Fleet's liability as an operator.

ational management of a facility. In *United States v. Mirabile*, the first case to suggest this interpretation, the district court granted summary judgment to the defendant creditors because their participation in the affairs of the facility was "limited to participation in financial decisions." No. 84-2280, slip op. at 3 (E.D.Pa. Sept. 6, 1985) (available on WESTLAW as 1985 WL 97). The court explained "that the participation which is critical is participation in operational production, or waste disposal activities. Mere financial ability to control waste disposal practices . . . is not . . . sufficient for the imposition of liability." *Mirabile*, No. 84-2280, slip op. at 4; accord *United States v. New Castle County*, 727 F.Supp. 854, 866 (D.Del.1989); *Rockwell International v. IU International Corp.*, 702 F.Supp. 1384, 1390 (N.D.Ill. 1988); see also *Coastal Casting Service v. Aron*, No. H-86-4463, slip op. at 4 (S.D.Tex. April 8, 1988) (available on WESTLAW as 1988 WL 35012) (complaint alleging that secured creditor's entanglement with facility's management surpassed mere financial control held sufficient). The court concluded that "before a secured creditor . . . may be held liable, it must, at a minimum, participate in the day-to-day operational aspects of the site. [Here, the creditor] . . . merely foreclosed on the property after all operations had ceased and thereafter took prudent and routine steps to secure the property against further depreciation." [†] *Id.* at 12; accord *United States*

[†] The court permitted a secured creditor to secure a facility against vandalism by boarding up windows and changing locks, make inquiries as to the cost of disposing of various drums of toxins, visit the property in order to show it to prospective purchasers, monitor its cash collateral accounts, ensure that receivables went to the proper accounts, and establish a reporting system between the facility and the bank. *Mirabile*, No. 84-2280, slip op. at 5, 8. The court suggested that activities which might bring a secured creditor outside the protection of the exception included determining the order in which orders were filled, demanding additional sales from the facility, supervising the operations of the facility, and insisting on certain manufacturing changes and re-assignment of personnel. *Id.* at 8.

v. Nicolet, Inc., 712 F.Supp. 1193, 1204-05 (E.D.Pa. 1989).

The court below, relying on *Mirabile*, similarly interpreted the statutory language to permit secured creditors to

provide financial assistance and general, and even isolated instances of specific, management advice to its debtors without risking CERCLA liability if the secured creditor does not participate in the day-to-day management of the business or facility either before or after the business ceases operation.

United States v. Fleet Factors Corp., 724 F.Supp. 955, 960 (S.D. Ga. 1988); accord *Guidice*, at 561-62^{*}; *Nicolet*, 712 F.Supp. at 1205. Applying this standard, the trial judge concluded that from the inception of Fleet's relation with SPW in 1976 to June 22, 1982, when Baldwin entered the facility, Fleet's activity did not rise to the level of participation in management sufficient to impose CERCLA liability. The court, however, determined that the facts alleged by the government with respect to Fleet's involvement after Baldwin entered the facility were sufficient to preclude the granting of summary judgment in favor of Fleet on this issue.

^{*} In *Guidice*, the district court applied this analysis to exempt a bank from CERCLA liability because the bank's activities with respect to the facility were directed at protecting its security interest rather than controlling the facility's operational, production, or waste disposal activities. At 561-62. The bank's involvement with the facility included meetings where it was informed of the status of the facility's accounts, personnel changes, and the presence of raw materials; assistance in procuring a loan from another lender; communicating with local officials to assist the facility with wastewater discharge compliance; inspecting the property after it ceased operations; efforts to restructure the facility's loans; and an agreement to provide financing if a particular party purchased the facility at a foreclosure sale. *Id.* at 562.

Although we agree with the district court's resolution of the summary judgment motion, we find its construction of the statutory exemption too permissive towards secured creditors who are involved with toxic waste facilities. In order to achieve the "overwhelmingly remedial" goal of the CERCLA statutory scheme,⁹ ambiguous statutory terms should be construed to favor liability for the costs incurred by the government in responding to the hazards at such facilities. *Allis Chalmers*, 898 F.2d at 1317; see *Maryland Bank & Trust Co.*, 632 F.Supp. at 579 (secured creditor exemption should be construed narrowly); Note, *When a Security Becomes a Liability: Claims Against Lenders in Hazardous Waste Cleanup*, 38 Hastings L.J. 1261, 1285-86, 1291 (1987) (same) [hereinafter *Claims Against Lenders*]. The district court's broad interpretation of the exemption would essentially require a secured creditor to be involved in the operations of a facility in order to incur liability. This construction ignores the plain language of the exemption and essentially renders it meaningless. Individuals and entities involved in the operations of a facility are already liable as operators under the express language of section 9607 (a) (2). Had Congress intended to absolve secured creditors from ownership liability, it would have done so. Instead, the statutory language chosen by Congress explicitly holds secured creditors liable if they participate in the management of a facility.

Although similar, the phrase "participating in the management" and the term "operator" are not congruent. Under the standard we adopt today, a secured creditor may incur section 9607 (a) (2) liability, without being an operator,¹⁰ by participating in the financial management

⁹ *Allis Chalmers*, 898 F.2d at 1317; *United States v. Northeastern Pharmaceutical & Chemical Co.*, 810 F.2d 726, 733 (8th Cir. 1986), cert. denied, 484 U.S. 848, 108 S.Ct. 146, 98 L.Ed.2d 102 (1987).

¹⁰ For an example of activity that could subject a secured creditor to liability as an operator, see *Kayser-Roth Corp.*, 724 F.Supp. at 22-23.

of a facility to a degree indicating a capacity to influence the corporation's treatment of hazardous wastes. It is not necessary for the secured creditor actually to involve itself in the day-to-day operations of the facility in order to be liable—although such conduct will certainly lead to the loss of the protection of the statutory exemption. Nor is it necessary for the secured creditor to participate in management decisions relating to hazardous waste. Rather, a secured creditor will be liable if its involvement with the management of the facility is sufficiently broad to support the inference that it could affect hazardous waste disposal decisions if it so chose.¹¹ We, therefore, specifically reject the formulation of the secured creditor exemption suggested by the district court in *Mirabile*. See, No. 84-2280, slip op. at 4.

¹¹ This narrow construction of the secured creditor exemption is supported by the sparse legislative history on the subject. The Senate version of CERCLA initially lacked an exemption for secured creditors in its definition of "owner or operator." See S. 1480, 97th Cong., 2d Sess., reprinted in 2 Senate Comm. on Environmental and Public Works, 97th Cong., 2 Sess., 1 *A Legislative History of the CERCLA* 470 (Comm. Print 1983). Representative Harsha introduced the exemption to the bill that was finally passed stating:

This change is necessary because the original definition inadvertently subjected those who hold title to a . . . facility, but do not participate in the management or operation and are not otherwise affiliated with the person leasing or operating the . . . facility, to the liability provisions of the bill.

Remarks of Rep. Harsha, reprinted in 2 Senate Comm. on Environmental and Public Works, 97th Cong., 2d Sess., 2 *A Legislative History of the CERCLA* 945 (Comm. Print 1983) (emphasis added). The use of the word "affiliated" to describe the threshold at which a secured creditor becomes liable clearly indicates a more peripheral degree of involvement with the affairs of a facility than that necessary to be held liable as an operator. It also suggests that the interpretation of the exemption intended by Congress is more consistent with the level of secured creditor involvement described in our opinion than with the management of day-to-day operations standard set forth in *Mirabile*.

This construction of the secured creditor exemption, while less permissive than that of the trial court, is broader than that urged by the government and, therefore, should give lenders some latitude in their dealings with debtors without exposing themselves to potential liability. Nothing in our discussion should preclude a secured creditor from monitoring any aspect of a debtor's business. Likewise, a secured creditor can become involved in occasional and discrete financial decisions relating to the protection of its security interest without incurring liability.

Our interpretation of the exemption may be challenged as creating disincentives for lenders to extend financial assistance to businesses with potential hazardous waste problems and encouraging secured creditors to distance themselves from the management actions, particularly those related to hazardous wastes, of their debtors. See *Guidice*, at 562; Note, *Interpreting the Meaning of Lender Management Under Section 101(20)(A) of CERCLA*, 98 Yale L.J. 925, 928, 944 (1989). As a result the improper treatment of hazardous wastes could be perpetuated rather than resolved. These concerns are unfounded.

Our ruling today should encourage potential creditors to investigate thoroughly the waste treatment systems and policies of potential debtors. If the treatment systems seem inadequate, the risk of CERCLA liability will be weighed into the terms of the loan agreement. Creditors, therefore, will incur no greater risk than they bargained for and debtors, aware that inadequate hazardous waste treatment will have a significant adverse impact on their loan terms, will have powerful incentives to improve their handling of hazardous wastes.

Similarly, creditors' awareness that they are potentially liable under CERCLA will encourage them to monitor the hazardous waste treatment systems and policies of their debtors and insist upon compliance with acceptable

treatment standards as a prerequisite to continued and future financial support. *Claims Against Lenders, supra*, at 1294; Note, *The Liability of Financial Institutions for Hazardous Waste Cleanup Costs Under CERCLA*, 1988 Wis.L.Rev. 139, 185 (1988) [hereinafter *Liability of Financial Institutions*].¹² Once a secured creditor's involvement with a facility becomes sufficiently broad that it can anticipate losing its exemption from CERCLA liability, it will have a strong incentive to address hazardous waste problems at the facility rather than studiously avoiding the investigation and amelioration of the hazard.

In *Maryland Bank & Trust Co.*, the court aptly described and weighed the competing policy interests of creditors and the government in interpreting the secured creditor exemption:

In essence, the defendant's position would convert CERCLA into an insurance scheme for financial in-

¹² One commentator notes that a narrow construction of the secured creditor exception

conforms with CERCLA's implicit function of encouraging safer hazardous waste procedures. The possibility that CERCLA liability will depress the value of the security property provides economic incentive for lenders to guard against its misuse. Lending institutions are especially well-equipped for this function. They can require the borrower to submit to periodic environmental audits, either as a condition to receiving a loan or by an amendment to an existing agreement. Lenders can also require warranties from their borrowers guaranteeing that they are in full compliance with hazardous waste laws and regulations. . . . Ultimately, lenders can refuse to lend money to persons believed to be operating illegal or improper hazardous waste activities. While there is a clear risk that innocent borrowers will find it difficult to obtain credit because of the nature of their business, this result is consistent with CERCLA's general effect of spreading hazardous waste costs industry-wide.

Claims Against Lenders, supra, at 1294 (citations omitted); see also *Liability of Financial Institutions*, *supra*, at 183-85 (discussing lender strategies for decreasing liability risk under a narrow interpretation of the secured creditor exception).

stitutions, protecting them against possible losses due to the security of loans with polluted properties. Mortgagees, however, already have the means to protect themselves, by making prudent loans. Financial institutions are in a position to investigate and discover potential problems in their secured properties. For many lending institutions, such research is routine. CERCLA will not absolve them from responsibility for their mistakes of judgment.

632 F.Supp. at 580 (citations omitted).

We agree with the court below that the government has alleged sufficient facts to hold Fleet liable under section 9607(a)(2). From 1976 until SPW ceased printing operations on February 27, 1981, Fleet's involvement with the facility was within the parameters of the secured creditor exemption to liability. During this period, Fleet regularly advanced funds to SPW against the assignment of SPW's accounts receivable, paid and arranged for security deposits for SPW's Georgia utility services, and informed SPW that it would not advance any more money when it determined that its advanced sums exceeded the value of SPW's accounts receivable.

Fleet's involvement with SPW, according to the government, increased substantially after SPW ceased printing operations at the Georgia plant on February 27, 1981 and began to wind down its affairs. Fleet required SPW to seek its approval before shipping its goods to customers, established the price for excess inventory, dictated when and to whom the finished goods should be shipped, determined when employees should be laid off, supervised the activity of the office administrator at the site, received and processed SPW's employment and tax forms, controlled access to the facility, and contracted with Baldwin to dispose of the fixtures and equipment at SPW. These facts, if proved, are sufficient to remove Fleet from the protection of the secured creditor exemption. Fleet's involvement in the financial management of

the facility was pervasive, if not complete.¹³ Furthermore, the government's allegations indicate that Fleet was also involved in the operational management of the facility. Either of these allegations is sufficient as a matter of law to impose CERCLA liability on a secured creditor. The district court's finding to the contrary is erroneous.

With respect to Fleet's involvement at the facility from the time it contracted with Baldwin in May 1982 until Nix left the facility in December 1983, we share the district court's conclusion that Fleet's alleged conduct brought it outside the statutory exemption for secured creditors.¹⁴ Indeed, Fleet's involvement would pass the

¹³ Generally, the lender's capacity to influence a debtor facility's treatment of hazardous waste will be inferred from the extent of its involvement in the facility's financial management. Here, that inference is not even necessary because there was evidence before the district court that Fleet actively asserted its control over the disposal of hazardous wastes at the site by prohibiting SPW from selling several barrels of chemicals to potential buyers. As a result, the barrels remained at the facility unattended until the EPA acted to remove the contaminants.

¹⁴ The district court summarized the government's allegations of Fleet's conduct at the facility during this period as follows:

Plaintiff alleges that Baldwin moved the barrels that allegedly contained hazardous substances before Baldwin conducted the public auction. Plaintiff contends that after the auction, Baldwin auctioned some, but not all, of the machinery and equipment as is, and in place, and permitted the purchasers to remove the equipment and machinery that they had purchased. Plaintiff asserts that after the auction Fleet signed a document that permitted Nix to have access to the facility for 180 days and to remove any remaining machinery and equipment. . . . Plaintiff maintains that friable asbestos was knocked loose from the pipes connected to the machinery and equipment by either the purchasers of the equipment at the auction or Nix. Plaintiff alleges that the condition of the chemicals and the asbestos in the facility after Baldwin, Nix, and the purchasers concluded their business constituted an immediate risk to public health and the environment. . . .

Fleet Factors, 724 F.Supp. at 960-61. Fleet disputes these material facts. *Id.* at 961.

threshold for operator liability under section 9607(a)(2).¹⁵ Fleet weakly contends that its activity at the facility from the time of the auction was within the secured creditor exemption because it was merely protecting its security interest in the facility and foreclosing its security interest in its equipment, inventory, and fixtures. This assertion, even if true, is immaterial to our analysis. The scope of the secured creditor exemption is not determined by whether the creditor's activity was taken to protect its security interest. What is relevant is the nature and extent of the creditor's involvement with the facility, not its motive. To hold otherwise would enable secured creditors to take indifferent and irresponsible actions toward their debtors' hazardous wastes with impunity by incanting that they were protecting their security interests. Congress did not intend CERCLA to sanction such abdication of responsibility.

CONCLUSION

We agree with the district court that Fleet is not within the class of liable persons described in section 9607(a)(1). We also conclude that the court properly denied Fleet's motion for summary judgment. Although the court erred in construing the secured creditor exemption to insulate Fleet from CERCLA liability for its con-

¹⁵ During oral argument, counsel for Fleet virtually conceded operator liability for its conduct with respect to the facility when he discussed Fleet's potential for liability were it to have fixed a hole in the roof of an SPW building:

JUDGE KRAVITCH: If [Fleet] finds in fixing the roof that there is some asbestos that is being dislodged can it just ignore that?

MR. GOOD: Once it fixes the roof, once it takes over control of fixing the roof, it has opened a potential pandora's box both as to that asbestos and anything else at that facility underneath it known and unknown.

JUDGE KRAVITCH: Why isn't that analogous to what happened here?

duct prior to June 22, 1982, it correctly ruled that Fleet was liable under section 9607(a)(2) for its subsequent activities if the government could establish its allegations. Because there remain disputed issues of material fact, the case is remanded for further proceedings consistent with this opinion.

AFFIRMED AND REMANDED.

APPENDIX B

U.S. DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

No. CV 687-070

UNITED STATES OF AMERICA,
Plaintiff,
vs.

FLEET FACTORS CORP.,
CLIFFORD HOROWITZ and MURRAY NEWTON,
Defendants.

FLEET FACTORS CORP.,
Third-Party Plaintiff,

vs.

ROBERT KOLODNEY, as Trustee in Bankruptcy of
Swainsboro Print Works, Inc.,
Third-Party Defendant.

December 22, 1988

Richard G. Leland, Mineola, N.Y., for Fleet Factors.
G. Stephen Manning, Dept. of Justice, Wash., D.C., for
United States.

Charles R. Merrill, Swainsboro, Ga., for Clifford Horowitz.

Murray Newton, Severna Park, Md., pro se.

Before Dudley Brown, district judge.

ORDER

Before the Court are (1) plaintiff's motion for partial summary judgment on the issue of liability against defendants Clifford Horowitz ("Horowitz"), Murray Newton ("Newton"), and Fleet Factors Corporation ("Fleet"); and (2) defendant Fleet's motion for summary judgment. A motion hearing with oral argument was conducted August 11, 1988.

FACTS

I will summarize the facts as to which there is no genuine dispute. From approximately 1963 until February, 1981, Swainsboro Print Works, Inc. ("SPW"), or its predecessor in interest, operated a cloth printing facility on its premises in Swainsboro, Georgia. Defendants Clifford Horowitz and Murray Newton were the only shareholders of SPW at the time it ceased operations. They were actively involved in the management of SPW until that time. In 1976, SPW and Fleet entered into a factoring agreement in which Fleet agreed to advance funds against the assignment of SPW's accounts receivable. As collateral for these advances, Fleet also obtained a security interest in all of SPW's equipment, inventory, and fixtures. As additional collateral, Fleet was granted a security interest in the SPW plant or facility ("facility") evidenced by a deed to secure a debt conveying title to the realty. Although Fleet foreclosed on its security interest in some of SPW's inventory and equipment in May, 1982, Fleet never foreclosed on the real property. The facility was conveyed to Emanuel County, Georgia, on July 7, 1987, at a foreclosure sale resulting from SPW's failure to pay state and county taxes.

The financing arrangement between Fleet and SPW continued until August, 1979, when SPW filed for Chap-

ter 11 bankruptcy. Fleet continued to finance SPW as debtor-in-possession on similar terms pursuant to a court approved factoring agreement.

On February 27, 1981, SPW ceased operations at the facility. Just prior to that date, Fleet had advised SPW's principals that it would not advance additional funds to SPW because SPW's account already was over advanced, that is, SPW's debt to Fleet exceeded Fleet's estimate of the value of SPW's accounts receivable. SPW would down its operation by selling off some remaining inventory. Fleet continued to collect on the accounts receivable assigned to it under the chapter 11 factoring agreement. Subsequently, in December 1981, SPW was adjudicated a bankrupt under chapter 7 of the bankruptcy code, and a trustee was appointed to supervise the liquidation of assets. The trustee assumed the usual statutory powers and title to the debtor's property.

When SPW ceased operations, there were approximately 20-25 million yards of cloth at the facility. SPW had printed substantially all of the goods according to specific customers' orders. SPW retained a small crew of no more than 12 to 15 people to wind up the affairs of the company and to ship the remaining goods. During the liquidation of the remaining inventory, Fleet continued to check the credit of SPW's customers before SPW shipped the goods to the customers. This did not represent any change in Fleet's normal practice as a secured lender. SPW forwarded the funds it received to Fleet as partial payment for its post-chapter 11 debt.

After obtaining bankruptcy court approval in May, 1982, Fleet foreclosed on its security interest in some of SPW's inventory and equipment and contracted with Baldwin Industrial Liquidators, Inc. ("Baldwin") to conduct an auction and sell the inventory and equipment. Baldwin conducted a public auction on June 22, 1982, at which Baldwin sold some, but not all, of SPW's inventory and equipment for Fleet. Baldwin sold the collateral "as

is" and "in place", and removal was the responsibility of the purchasers.

On August 31, 1982, Clifford Greenside signed a document in his capacity as a representative of Fleet that permitted Nix Riggers ("Nix") to remove the un-sold equipment and the equipment that the purchasers had not removed after the public auction. As consideration for this right, the August 31, 1982, document directed Nix "to leave the premises in 'broom clean' condition." The August 31, 1982, document allowed Nix up to 180 days, which could be extended in writing, to complete the terms and conditions of that document. Nix left the facility in or around December 1983.

Although there is no genuine dispute concerning the foregoing facts, there is a genuine dispute concerning many of the events that surrounded the June 22, 1982, auction. Plaintiff contends that Baldwin moved fifty-five gallon drums away from the sales area before the auction. Plaintiff alleges that shortly before the auction the facility contained 400-500 leaking and rusting fifty-five gallon drums containing dyes and chemicals. Plaintiff asserts that the removal of equipment or machinery by Nix or purchasers of equipment at the auction disturbed asbestos that allegedly was on the pipes that were connected to the equipment or machinery.

In addition to disputing plaintiff's version of the events surrounding the auction and subsequent removal of the equipment and machinery at the facility, Fleet argues that plaintiff has not produced any credible evidence that the material around the pipes that were connected to the machinery and equipment was asbestos. Defendant alternatively contends that even if plaintiff incurred response costs for chemicals or asbestos that were in the facility when plaintiff conducted a site inspection on January 20, 1984, any improper disposal of environmental contaminants already had occurred before Fleet used the facility to foreclose on SPW's inven-

tory and equipment. *Cf.* 42 U.S.C. § 9607(a)(2) (West Supp. 1988) (providing that an operator of a facility is not liable for response costs unless he operated the facility "at the time of disposal" of a hazardous substance). There is no genuine dispute that neither Fleet nor its agents entered the facility as an operator or otherwise operated the facility before Baldwin conducted an suction at the facility on June 22, 1982, or after Nix left the facility in or around December, 1983.

On January 20, 1984, plaintiff, through the Environmental Protection Agency ("EPA"), inspected the facility. Plaintiff alleges that it found 700 fifty-five gallon drums containing toxic chemicals. Plaintiff alleges that the toxic chemicals that it found were an immediate threat to public health and the environment. Based on this conclusion, the EPA initiated the first of a two-part response to the alleged environmental threat. Between February 6-24, 1984, the EPA disposed of the solutions in the fifty-five gallon drums.

After assessing the condition of the asbestos allegedly found at the facility, the EPA concluded that the asbestos problem, if unabated, presented a serious threat to public health and the environment. Therefore, between June 12, 1984, and July 11, 1984, the EPA conducted the second phase of its response to the alleged environmental threat and removed forty-four truck loads of material containing asbestos to an approved landfill. Plaintiff alleges that it incurred costs of almost \$400,000 in both phases of its response to the alleged environmental threat at the facility.

STANDARD OF REVIEW

Summary judgment is only appropriate if a party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). When the moving party's motion for summary judgment

has pierced the pleadings of the opposing party, the burden then shifts to the opposing party to demonstrate that a genuine issue of fact exists. *Cole v. Elliot Equip. Corp.*, 653 F.2d 1031, 1033 (5th Cir. 1981) (citing Fed. R. Civ. P. 56(e)). A party cannot carry this burden by relying on conclusory allegations in the pleadings. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (quoting *First Nat'l Bank of Arizona v. Cities Serv. Co.*, 391 U.S. 253, 288 (1968); Fed. R. Civ. P. 56(e)). A federal court may not grant summary judgment, however, unless there is only one reasonable conclusion concerning the verdict. *Id.* at 250-52. Moreover, federal courts should resolve all reasonable doubts concerning the factual submissions in favor of the party opposing summary judgment. *Casey Enter. v. American Hardware Mut. Ins. Co.*, 655 F.2d 598, 602 (5th Cir. 1981). With these principles in mind, I will decide to discuss motions for summary judgment in this case.

DISCUSSION

Plaintiff brought this action against defendants pursuant to the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9601-57 (1982 and West Supp. 1988), as amended by the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613. The relevant provisions of CERCLA provide that the current owner and operator of a facility, or, any person who owned or operated the facility at the time hazardous substances were disposed of, is liable for any response costs of plaintiff to remedy a release or threatened release of a hazardous substance. *See* 42 U.S.C. § 9607(a)(1)-(2) & (4) (West Supp. 1988).

The Court initially will address plaintiff's motion for partial summary judgment against Fleet on the issue of liability and Fleet's cross motion for summary judgment against plaintiff.

To prevail under CERCLA, plaintiff must establish that: (1) Defendant falls within one or more of the classes of liable persons described in 42 U.S.C. § 9607(a) (1)-(4) (West Supp. 1988); (2) A "release" or "threatened release" of a "hazardous substance" has occurred or is occurring; and (3) The release or threatened release has caused the United States to incur "response costs." See *New York v. Shore Realty Corp.*, 759 F.2d 1092, 1049-48 [92 ERC 1625] (2d Cir. 1985); 42 U.S.C. § 9607(a) (1)-(4) (West Supp. 1988).

Of the three elements just described, the element that Fleet most vigorously contests is the first element, which requires the government to establish Fleet's inclusion in one of the classes of liable persons. Plaintiff contends that Fleet is within the class of liable persons described as "the owner and operator of a facility." 42 U.S.C. § 9607(a) (1) (West Supp. 1988). This provision obviously refers to the owner of the facility on July 9, 1987, the date plaintiff filed its complaint. CERCLA defines "owner and operator . . . in the case of any facility, title or control of which was conveyed to a unit of State or local government, [as] any person who owned, operated or otherwise controlled activities at such facility immediately beforehand." *Id.* § 9601(20) (A). Emanuel County's tax foreclosure of the facility occurred on July 7, 1987. Nix left the facility in or around December, 1988. Fleet never foreclosed on its security interest in the facility. Neither Fleet nor any of its putative agents had any access, or other control, or engaged in any activities at the facility after Nix left the facility in or around December, 1988. Based on the undisputed facts, I conclude as a matter of law that Fleet did not own, operate or otherwise control activities at the facility immediately before the tax foreclosure. Accordingly, Fleet is not in the class of liable persons described in 42 U.S.C. § 9607(a) (1) (West Supp. 1988).

Plaintiff alternatively argues that Fleet is in the class of liable persons described in 42 U.S.C. § 9607(a) (2)

(West Supp. 1988). That provision imposes CERCLA liability on "any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of" *Id.* For the purpose of the foregoing provision, CERCLA excludes from the definition of "owner or operator" any "person, who, without participating in the management of a vessel or facility, holds *indicia of ownership* primarily to protect his security interest in the vessel or facility." *Id.* § 9601(2)(A) (emphasis added). I interpret the phrases "participating in the management of a . . . facility" and "*primarily* to protect his security interest," to permit secured creditors to provide financial assistance and general, and even isolated instances of specific, management advice to its debtors without risking CERCLA liability if the secured creditor does not participate in the day-to-day management of the business or facility either before or after the business ceases operation. *Id.*; *cf. United States v. Mirabile*, 1985, Env'tl. L. Rep. 10994, 10995 (E.D. Pa. Sept. 4, 1985) (holding that secured creditor exclusion from CERCLA liability applies if secured creditor "does not become overly entangled in the affairs of the actual owner or operator of a facility").

Plaintiff concedes that Fleet never owned the facility within the meaning of CERCLA. Plaintiff argues, however, that Fleet's activities at the facility both before and after Baldwin entered the facility to prepare for, and conduct the auction constituted participation in the management of the facility sufficient to impose CERCLA liability on Fleet. I first will address the period of time between 1976 when Fleet commenced its relationship with SPW and shortly before June 22, 1982, when Baldwin entered the facility. I have carefully reviewed plaintiff's factual submissions and argument concerning that period and defendants countervailing submissions and argument. I have resolved all doubts in the factual record for that period in favor of plaintiff, the non-moving party.

I conclude as a matter of law that Fleet's activities at the facility did not rise to the level of participation in management sufficient to impose CERCLA liability on Fleet for its activities before Baldwin entered the facility to prepare for, and conduct, the auction.

I now will discuss Fleet's activities at the facility between the time that Baldwin entered the facility to prepare for and conduct the June 22, 1982, auction and the time that Nix finally left the facility in or around December, 1983.

Plaintiff alleges that Baldwin moved the barrels that allegedly contained hazardous substances before Baldwin conducted the public auction. Plaintiff contends that after the auction, Baldwin auctioned some, but not all, of the machinery and equipment as is, and in place, and permitted the purchasers to remove the equipment and machinery that they had purchased. Plaintiff asserts that after the auction Fleet signed a document that permitted Nix to have access to the facility for 180 days and to remove any remaining machinery and equipment that either was not sold at the auction or was not removed by the purchaser. Plaintiff maintains that friable asbestos was knocked loose from the pipes connected to the machinery and equipment by either the purchasers of the equipment at the auction or Nix. Plaintiff alleges that the condition of the chemicals and the asbestos in the facility after Baldwin, Nix, and the purchasers concluded their business constituted an immediate risk to public health and the environment for which it incurred response costs. Plaintiff concludes that Fleet is liable for those response costs under CERCLA.

Fleet genuinely disputes the foregoing material facts alleged by plaintiff. I conclude that the foregoing genuinely disputed facts, and other genuinely disputed facts that I have not mentioned, preclude me from granting the cross motions for summary judgment between plaintiff and Fleet. Accordingly, plaintiff's motion for partial

summary judgment against Fleet on the issue of liability and Fleet's motion for summary judgment are DENIED.

I now will address plaintiff's motion for partial summary judgment against Horowitz and Newton on the issue of liability.* I will summarize the relevant facts that I find are not genuinely disputed. On February 27, 1981, SPW ceased operations. Both before and after that date, Horowitz and Newton actively managed the facility. Horowitz and Newton each held fifty percent of the shares of SPW. Both Horowitz and Newton managed the facility for SPW as debtor-in-possession pursuant to chapter 11 of the bankruptcy code until December, 1981, when SPW was adjudicated a bankrupt under chapter 7 of the bankruptcy code. There were at least some chemicals in fifty-five gallon drums in the facility at the time that Horowitz and Newton ceased actively managing the facility. The chemicals in the fifty-five gallon drums were hazardous substances within the meaning of CERCLA. Horowitz and Newton originally procured the fifty-five gallon drums containing hazardous chemicals that the EPA found in the facility for the purpose of operating SPW's cloth printing business.

Horowitz and Newton fall within the class of liable persons described as those who owned or operated a facility "at the time of disposal of any hazardous sub-

* Clifford Horowitz filed a memorandum in opposition to plaintiff's motion for partial summary judgment on July 6, 1988. On August 4, 1988, this Court notified all parties in this case of an August 11, 1988, hearing on plaintiff's May 20, 1988, motion. I considered Mr. Horowitz's submission and oral argument before ruling on plaintiff's motion for partial summary judgment. Murrery Newton, who elected to proceed *pro se* after filing several submissions through his former attorney, Charles B. Merrill, Jr., Esq., however, has not responded to plaintiff's motion for partial summary judgment, nor did Mr. Newton appear at the August 11, 1988, hearing on plaintiff's motion. Nevertheless, Fed. R. Civ. P. 56(c) permits this Court to grant summary judgment against Mr. Newton, if appropriate, because a hearing on plaintiff's motion was held over ten (10) days after plaintiff filed its motion.

stance.” 42 U.S.C. § 9607(b)(3) (1982). Both Horowitz and Newton assert, however, the third-party defense to CERCLA liability. *See id.* § 9607(b)(3). The third-party defense provides that a person who falls within one of the classes of liable persons under CERCLA may avoid liability if he establishes “by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused *solely* by . . . an act or omission of a third party other than an employee or agent of the defendant. . . .” *Id.* (emphasis added). Horowitz argues that Fleet was solely responsible for the release of hazardous substances at the facility. Newton makes a similar claim in his deposition testimony. Horowitz and Newton claim that Fleet told them not to sell or otherwise dispose of the chemicals at the facility because the chemicals possibly were marketable and Fleet had a security interest in the chemicals. Even if that allegation were true, there is no allegation that Horowitz and Newton, in their capacity as active managers of SPW as a debtor-in-possession, did not have, or could not have obtained bankruptcy court approval to sell or otherwise properly dispose of the hazardous chemicals in the facility after SPW ceased operations. Accordingly, based on the foregoing facts that are not genuinely disputed, I find as a matter of law that Horowitz and Newton are not entitled to the third-party defense to CERCLA liability with respect to plaintiff’s response costs for the chemicals contained in the fifty-five gallon drums because a third party was not *solely* responsible, to the exclusion of Horowitz and Newton, for the release or threatened release of the hazardous substances contained in the fifty-five gallon drums. Therefore, plaintiff’s motion for partial summary judgment against Horowitz and Newton on the issue of liability is GRANTED with respect to plaintiff’s response costs for removing the hazardous substances found in the fifty-five gallon drums.

With respect to the asbestos that EPA found at the facility in 1984, any environmental hazard created by the asbestos could have occurred solely in connection with the removal of machinery and equipment by either the purchasers at the foreclosure sale arranged by Fleet or by Nix pursuant to his agreement with Fleet. Therefore, a genuinely disputed factual issue exists concerning whether Fleet, Baldwin, Nix, and the purchasers of the machinery and equipment at the facility *solely* caused any environmental hazard created by the asbestos at the facility when they removed the machinery and equipment. Accordingly, plaintiff's motion for partial summary judgment against Horowitz and Newton on the issue of liability is DENIED with respect to plaintiff's response costs for removing the asbestos from the facility.

CERTIFICATION

No federal appellate court has addressed the legal issues or factual applications addressed in this order. Pursuant to 28 U.S.C. § 1292(b) (West Supp. 1988) (section 1292(b)), federal district courts have authority to certify the issues in an order for interlocutory appeal. Section 1292(b) was passed to "aid in the disposition of cases before the district courts of the United States by saving useless expenditure of court time. . . ." S. Rep. No. 2434, 85 Cong. 2d Sess. 3-4. The decision concerning whether or not to allow an interlocutory appeal is within the discretion of the district court. *Id.* A district court only should allow such appeals in exceptional circumstances. H.R. Rep. No. 1667, 85th Cong., 2d Sess. 1-2. This case, however, is appropriate for section 1292(b) certification.

I find that this order disposes of controlling questions of law concerning which there is substantial doubt including, but not limited to, my construction of CERCLA's definition of "owner and operator" and the secured lender exemption contained in that definition; my construction

of the CERCLA provisions describing the classes of liable persons; and my construction of the scope of the third-party defense to CERCLA liability. I also find that an immediate appeal from this "order may materially advance the ultimate termination of [this] litigation. . . ." 28 U.S.C. § 1292(b) (West Supp. 1988). If this order were modified or reversed on appeal after trial, a new trial that would waste scarce judicial resources likely would be necessary.

For the foregoing reasons, pursuant to section 1292 (b), I certify that this case is appropriate for interlocutory appeal. If any party to this case requests an interlocutory appeal pursuant to section 1292(b), all proceedings in this case hereby are STAYED. The stay shall commence on the date that any party applies for an interlocutory appeal in the Court of Appeals and shall conclude on the date that the Court of Appeals either disposes of the interlocutory appeal on its merits or denies all applications for interlocutory appeal.

CONCLUSION

To recapitulate: (1) Plaintiff's motion for partial summary judgment against Fleet on the issue of liability is DENIED; (2) Fleet's motion for summary judgment is DENIED; (3) Plaintiff's motion for partial summary judgment against Horowitz and Newton on the issue of liability is GRANTED with respect to plaintiff's response costs for removing the hazardous substances found in the fifty-five gallon drums; (4) Plaintiff's motion for partial summary judgment against Horowitz and Newton on the issue of liability is DENIED with respect to plaintiff's response costs for removing the asbestos from the facility; (5) This case hereby is CERTIFIED as appropriate for interlocutory appeal pursuant to section 1292(b); and (6) All proceedings in this case are STAYED, commencing on the date that any party applies for an interlocutory appeal in the Court of Appeals

and concluding on the date that the Court of Appeals either disposes of the interlocutory appeal on its merits or denies all applications for interlocutory appeal.

ORDER ENTERED at Augusta, Georgia, this 22nd day of December, 1988.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 89-8094

D.C. Docket No. CV687-070

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

FLEET FACTORS CORP.,
*Defendant-Third-Party
Plaintiff-Appellant,*

CLIFFORD HOROWITZ and MURRAY NEWTON,
Defendants,

ROBERT KOLODNEY, ESQ.,
as Trustee of Swainsboro Print Works, Inc.,
*Debtor,
Third-Party Defendant.*

Appeal from the United States District Court
for the Southern District of Georgia

Before VANCE* and KRAVITCH, Circuit Judges, and
LYNNE**, Senior District Judge.

* Judge Robert S. Vance was a member of the panel which heard oral argument but due to his death on December 16, 1989, did not participate in this decision. This case is decided by a quorum. See 28 U.S.C. § 46(d).

** Honorable Seybourn H. Lynne, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

JUDGMENT

This cause came on to be heard on the transcript of the United States District Court for the Southern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the order of the District Court appealed from in this cause be and the same is hereby **AFFIRMED**; and that this cause be and the same is hereby **REMANDED** to said District Court for further proceedings in accordance with the opinion of this Court;

IT IS FURTHER ORDERED that each party bear their own costs on appeal.

Entered: May 23, 1990

For the Court:

MIGUEL J. CORTEZ
Clerk

By: /s/ David Maland
Deputy Clerk

Issued as Mandate: Jul. 27, 1990

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 89-8094

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus

FLEET FACTORS CORP.,
Defendant-Third Party
Plaintiff-Appellant,

CLIFFORD HOROWITZ and MURRAY NEWTON,
Defendants,

ROBERT KOLODNEY, Esq.,
as Trustee of Swainsboro Print Works, Inc.,
Debtor,
Third-Party Defendant.

On Appeal from the United States District Court
for the Southern District of Georgia

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC

(Opinion May 23, 11th Cir., 1990, — F.2d —)
(July 17, 1990)

Before: VANCE * and KRAVITCH, Circuit Judges,
and LYNNE *, Senior District Judge.

* Judge Robert S. Vance was a member of the panel which heard oral argument but due to his death on December 16, 1989 did not participate in this decision. This case is decided by a quorum. See 28 U.S.C. § 46(d).

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ **Phyllis Kravitch**
PHYLLIS KRAVITCH
United States Circuit Judge

